IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	**)**	
	)	
Respondent,	**)**	
	)	
vs.	**)**	**No. SC 84621**
	)	
GERALD M. ELAM,	**)**	
	)	
Appellant.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF LIVINGSTON COUNTY, MISSOURI
FORTY-THIRD JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE KENNETH R. LEWIS, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Gerald Elam appeals his conviction following a jury trial in the Circuit Court of Livingston County, Missouri, for first degree murder, § 565.020,[1] armed criminal action, §571.015, and second degree arson, § 569.050. The Honorable Kenneth R. Lewis sentenced Mr. Elam to consecutive sentences of life imprisonment without the possibility of parole for murder, life imprisonment for armed criminal action, and seven years for second degree arson. After the Missouri Court of Appeals, Western District, issued its opinion in WD59349, this Court granted Mr. Elam's application for transfer pursuant to Rule 83.03. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

[1] All statutory citations are to RSMo 1994, unless otherwise stated.

STATEMENT OF FACTS

It was not contested that Gerald Elam killed his grandfather, Minis. Rather, the issue at trial was Gerald's state of mind when he stabbed Minis Elam and set fire to his house (Tr. 144).[2] Gerald's primary defense, on which defense and State psychiatrists largely agreed, was that Gerald had a mental disease that impaired his ability to appreciate the nature and quality of his acts (Supp.L.F. 10; Tr. 377-78, 380, 385-86, 394-95, 400). The experts differed only on whether Gerald appreciated the wrongfulness of his act (StayTr. 49-51; Tr. 400). Also contested was whether Gerald was competent to be tried (L.F. 47; StayTr. 2).

Minis, eighty-seven years old in June, 1997, lived alone in the small town of Callao, near Macon (Tr. 170-71, 195, 229; State's Exhibit 19). Gerald lived outside Callao, and spent some amount of time with his grandfather (Tr. 357, 362-64). There were differing opinions of whether or not they got along (Tr. 181, 356-57).

Late Evening, June 2, 1997 - Early Morning, June 3

Within a half hour either side of midnight on June 2-3, 1997, trucker Michael

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[2] The Record on Appeal consists of a trial transcript (Tr.), a transcript of pretrial hearings of May 15, 2000, and June 5, 2000 (Pretrial), a transcript of a hearing on a motion to suppress statements (Suppr.Tr.), a transcript of a hearing on a motion to stay proceedings (StayTr.), a legal file (L.F.), a supplemental legal file containing mental health reports submitted to the court as part of the Chapter 552 proceedings (Supp.L.F.), and Exhibit 24, a tape of Gerald's statement to police.

Croucher was returning to his home in Callao when he saw Gerald come from the direction of Minis's house and cross Highway 3 that runs through town (Tr. 150-55, 158). Gerald arrived at his friend Sharon Smith's home -- south of Bevier, about ten minutes away from Callao -- between 11:00 and 12:00 that night (Tr. 161-62). Gerald was all cleaned up, which was unusual for him, because Gerald was always working on the farm (Tr. 163). Gerald told her he had been cleaning house and got hot, so he cleaned up before going to her house (Tr. 163). There were three other people there when Gerald arrived (Tr. 169-70).

Smith was "doing" methamphetamine that night before Gerald got there, then "did" some with Gerald that he brought (Tr. 163). For no reason, Smith asked Gerald how Minis was doing (Tr. 165). She recalled Gerald mentioning something about Minis "running with some bad crowd", and saying, to no one in particular, that "people who do wrong eventually get theirs." (Tr. 165, 167). Gerald stayed at Smith's until 3:00 or 4:00 a.m. on the 3rd, leaving when Smith said she had to go to bed because she had to work the next day (Tr. 164-65, 169).

Discovery of Minis Elam's Death

Bruce and Vickie Latchford lived across Highway 3 from Minis (Tr. 170-71, 182). Shortly after 6:00 a.m. on June 3, they were getting ready to leave for work -- Bruce was out in the garden and Vickie was putting out some trash -- when Vickie saw Gerald run across the highway (Tr. 172, 184-85). Bruce ran up to Gerald, who then stopped (Tr. 173-74, 186). When Bruce asked Gerald what he was doing, Gerald

answered that he thought he had seen smoke (Tr. 175). Bruce turned to look for smoke and Gerald ran off (Tr. 175).

Bruce saw Gerald on a bicycle and he and Vickie caught up with him in their truck (Tr. 175-76). Bruce asked what he was doing and Gerald again said he had seen smoke (Tr. 176).[3] Bruce "took off as fast as he could" for Minis's, and had Vickie go home and call 911 (Tr. 176, 188). As Bruce got close to the house, he could see smoke coming from the eaves, and he tried to go in the back door -- which he knew Minis did not lock -- to get him out (Tr. 177). He could not get far before the smoke drove him back, so he took a board and broke Minis's bedroom window (Tr. 178). He reached in and could feel the foot of the bed, but did not feel Minis (Tr. 178). Bruce tried the front door, but he again did not find Minis (Tr. 178).

The fire department arrived soon thereafter (Tr. 180). One firefighter noticed a knife on a table in the kitchen area (Tr. 200-01). It was a sharp pointed knife with a charred wooden handle, and a blade about six inches long and three-quarters of an inch wide (Tr. 201). After the fire was out, Minis's body was discovered lying across his bed (Tr. 190-91).

Investigation

The Macon County Sheriff, Robert Dawson, responded to the scene and the Latchfords told him about Gerald's actions (Tr. 205-06). The sheriff approached

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[3] Bruce did not recognize Gerald at first -- until Gerald referred to himself by his nickname, Hoss (Tr. 176-77).

Gerald, whom he had seen walking up to the area, to get a statement (Tr. 206-07). The sheriff later found Gerald's pickup nearby (Tr. 208). Based on what the Latchfords had told him, he considered Gerald a suspect or at least a witness (Tr. 207). Gerald looked toward the house and asked if it was all right (Tr. 207). The sheriff told him no, and, knowing from the Latchfords that Gerald had been seen coming from the direction of Minis's house, asked if he had been there earlier, and if he had seen anything (Tr. 207). Gerald said he had not been in the area (Tr. 208).

Fire investigators determined that the fire was fueled by a flammable liquid poured on the floor of Minis's house (Tr. 279, 293, 299). A can of turpentine and a gas can were on the back porch, and lab tests showed gasoline and turpentine in the debris from the floor (Tr. 282, 300, 308-11). They could not rule out the stove as a source of ignition of the liquids (Tr. 300). The fire started within an hour of the call to the fire department at around 6:00 a.m. (Tr. 302).

First Interrogation, June 3

The sheriff told Gerald he needed a statement, and Gerald agreed to go to the sheriff's department (Tr. 209). Deputy Charles Muldoon met them to take Gerald's statement (Tr. 209). Muldoon sat with Gerald in a caged area of the booking room and asked him about the incident (Tr. 213, 215). Gerald said he had been in the area of his grandfather's and saw smoke coming from the house (Tr. 215). When Muldoon asked what Gerald was doing near the house, Gerald said he had picked up his bike and was riding it to his workshop -- south of his grandfather's on Highway 3 -- because the chain kept coming off (Tr. 216). Gerald said that he saw Vickie

Latchford and told her to call 911 (Tr. 217). He said he then rode away and did not say how he got back to Minis's house (Tr. 217). Gerald seemed upset during the interview, but "not really nervous" or inquisitive (Tr. 217). Gerald did not "admit to any involvement in the crime or being around the house" (Tr. 217).

Missouri State Highway Patrol Sergeant Mike Platte entered and took over the interview (Tr. 221-22). After trying first to build rapport with general conversation, Platte asked Gerald where he had been and what he had done (Tr. 223). Gerald said he had spent the night at Sharon Smith's, leaving there at about 5:00 a.m. (Tr. 223). He went home and did laundry for about an hour, then went to a store in Callao about 6:00 to get cigarettes (Tr. 224). The route Gerald described seemed strange to Platte, because it was roundabout, although Highway 3 went straight through town and would take Gerald where he was going (Tr. 224).

The store was closed so Gerald went to his shop, where he worked on his bike, then rode towards Minis's and saw smoke (Tr. 225). He stopped two blocks away and walked in that general direction to check it out (Tr. 225). He saw Vickie Latchford and ran towards her (Tr. 225). Then Bruce came out, and Gerald pointed at the smoke, told them to call 911, and rode towards his shop to look for someone who could help (Tr. 225). He saw some people going toward Minis's and assumed someone had called 911 (Tr. 225). Gerald went back to his shop, left his bike there and headed back towards Minis's, where he ran into the sheriff (Tr. 226).

Gerald told Platte that he had last seen Minis about a month before, at the "sale barn" -- a property Minis owned (Tr. 226, 236).[4] He said he was last at Minis's house some time before that (Tr. 226). When asked about his relationship with his grandfather, Gerald said that none of the family was very close (Tr. 226). Platte asked Gerald about some rumors he had heard about Minis buying a farm from some people named Lusher, and Gerald said that was Minis's business, not his (Tr. 227). Gerald thought Minis had been taken in the deal, but he never told Minis that (Tr. 227).

Platte asked Gerald if he thought the fire was accidental or intentional and Gerald said, "Intentionally set by the way I'm being questioned. It sounds to me like an arson because everyone's questioning me about it." (Tr. 228). Gerald did not know of anyone who would have a reason to burn Minis's house (Tr. 228). When Platte asked Gerald if he knew what had been used to start the fire, Gerald said he could only speculate, he "wasn't even sure the fire was coming from his place at first." (Tr. 228-29).

Platte then asked Gerald what should happen to the person responsible for the fire and Gerald said "I don't know, probably some kind of judgment. If they are

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[4] Gerald often spoke of the sale barn (Tr. 236). The old barn of Minis's was near Gerald's workshop (Tr. 236). The back part was used to keep livestock but the front had been vacant for some time, and Gerald wanted Minis to give him the barn, so Gerald could turn it into a restaurant (Tr. 236-40). Gerald also wanted Minis to give him the money to do the conversion (Tr. 237).

responsible, they should answer for it, provided in a fair way." (Tr. 229). When asked what that meant, Gerald said "They probably need help." (Tr. 229). He explained that he meant psychological help (Tr. 229). Platte asked what reason there was for anyone to set the fire and Gerald answered, "Could've been trying to rob him but I don't think he had a whole lot, though. He did live far off the roadway. Grandpa had mentioned he was lonely staying by himself and missed the company." (Tr. 229). Platte asked Gerald if he thought that the person that set this fire had set others (Tr. 229). Gerald said yes and Platte asked him why (Tr. 230). "By [his] imagination they may have done it before. The question wording makes me think that." (Tr. 230).

Platte asked why Gerald had been within a block of Minis's house and hadn't investigated to make sure everything was okay (Tr. 230). Gerald said he became nervous when the Latchfords saw him; it looked bad seeing the fire and being seen on foot (Tr. 230). Platte told Gerald that he did not believe he had told the complete truth and wanted to know what Gerald was holding back (Tr. 230). Gerald said he had told everything he could (Tr. 230). Platte then told Gerald that he believed what Gerald had said was true, but that he had only told him about seventy-five percent of the truth; he wanted the "other 25" (Tr. 230). Gerald said he was sorry Platte felt that way (Tr. 231).

Platte felt certain that Gerald had set the fire (Tr. 231). His tone then turned more accusatorial and he "offered him several alternatives and minimizations." (Tr. 231). He gave Gerald the opportunity to say that it was accidental, or self-defense, or that something happened because he lost his temper (Tr. 231). At that point, Gerald

told Platte he could see horns growing from the top of his head and called him Beelzebub (Tr. 231). He accused Platte of trying to hypnotize him (Tr. 232).

Autopsy

Initially, the coroner could not tell whether Minis had sustained any injuries other than the obvious burning, and arranged for an autopsy (Tr. 192-93). Platte attended the autopsy after interviewing Gerald (Tr. 232). Minis was stabbed four times in the chest, piercing his heart and lung and causing his death (Tr. 341-42). The lack of smoke in Minis's lungs meant that he died before the fire started, or at least reached the room he was in (Tr. 344-45, 349). The autopsy did not establish the time of death, but Minis had some mushroom slices in his stomach that were partially digested and would have been consumed within an hour or two of his death (Tr. 346-48).

Second Interrogation, June 5

Randy King, another sergeant with the Highway Patrol, interviewed Gerald on June 5 (Tr. 244, 246). Gerald said he did not get along well with Minis; his grandfather did not care for him (Tr. 247). As a child, Gerald feared Minis because he thought he was Beelzebub, the devil (Tr. 247-48). He recalled an incident in which Minis beat Gerald's grandmother and another in which they had sexual relations in front of Gerald (Tr. 248).[5] Gerald said that about a month before June 3, 1997, Minis came to Gerald's workshop and told Gerald he was the devil (Tr. 248). King asked

[5] King later testified that he first heard this in the interrogation on June 6th (Tr. 264).

Gerald if the incident at Minis's house was a confrontation between good and evil and Gerald said that he thought it was (Tr. 249).

Gerald denied being at Minis's house on June 3, so King drew a map and showed Gerald where he had been seen coming from the back of the house (Tr. 249-250). Gerald said, "They seen me. I just wanted to get it over with." (Tr. 251). He was crying (Tr. 251). King asked Gerald to go into detail about everything that happened (Tr. 249).

Gerald said he went home from Sharon Smith's, then back into town to get cigarettes (Tr. 252). While he was waiting for the store to open he went to Minis's because he had a lot of questions in his mind that Minis needed to answer (Tr. 252). King said that Gerald told him that as he walked by the kitchen table, he picked up a knife, because Minis had told him not to come into his house or he would shoot Gerald with a shotgun (Tr. 252-53).[6] King also agreed that Gerald said that he picked up the knife after Minis came at him (Tr. 265). Gerald said that Minis said "why, you" and started swinging at him, so Gerald "reached out defending himself and stabbed his grandpa four or five times with the knife." (Tr. 253). Minis lay on the bed and Gerald said to him, "I'm here for the reparation of St. Mary in the name of Jesus." (Tr. 253).[7] Gerald told King that he saw Minis in the spirit, reached out and grabbed

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[6] A shotgun and a .22 rifle were found in Minis's bedroom (Tr. 263).

[7] King said that Gerald actually used the word "haudasayhe", which he told King was a Hebrew word for Jesus (Tr. 253).

his form and kept it (Tr. 267). King did not ask Gerald what he meant by this (Tr. 267). During the interview, in which Gerald cried at times, Gerald said if this had happened in Israel, they would make him a king (Tr. 254).

There was a pan of grease on the stove, and Gerald turned the heat up on high (Tr. 254). He threw the knife into the kitchen (Tr. 254). The fire had started before he left the house (Tr. 254). King asked if he turned on the heat in hopes that the fire would cover up the murder, and Gerald said, "yes, and I wouldn't have to be going through all this (Tr. 255). Gerald said he sat on the back porch, contemplating his relationship with God (Tr. 254). He told King, "I knew I could stab him before God and he would give me a new life." (Tr. 254).

Gerald also discussed his use of methamphetamine (Tr. 255). He said he began using it in December, 1996, and it helped him remember things "back before he even existed." (Tr. 256). King had the impression that Gerald thought that after he gave his statement, he would be allowed to go home (Tr. 268-69).

Third Interrogation, June 6

King interrogated Gerald again on June 6, and tape recorded it at the request of the prosecuting attorney (Tr. 256-57, 259; Exhibit 24).[8] The statements Gerald gave on the 5th and the 6th were basically consistent with each other (Tr. 266). During the

[8] King testified that he was present when deputy Charles Muldoon conducted this interrogation (Tr. 256), but it is King's voice on the tape, and at the end, King asked "Charlie" if he had any questions and referred to "me and Charlie" (Exhibit 24).

course of this hour and thirty-five minute (Tr. 258) interrogation, Gerald said when he saw his grandfather beat his grandmother, he "grabbed a .22 back then and just about shot him for it." (Ex. 24). He heard a voice tell him to stop, which made him hesitate long enough for Minis to "jump out of the way and then come after me." *Id*. Another time, Minis exposed himself to Gerald, which frightened him. *Id*. Gerald said again that a month before, Minis told Gerald he was the devil. *Id*.[9]

For a long time, Gerald thought a man named Floyd Riley was the devil. In 1989, Riley confronted Gerald; he told Gerald to see Minis and he would find some answers. Gerald decided that a month before Minis's death, when he told Gerald he was the devil, "that's what maybe Floyd was trying to get to then." Over that month, Gerald began to remember more things that his grandfather had done; he came to the conclusion that Minis was the devil. *Id*.

When Gerald began using methamphetamine in December 1996, his memory began to go farther back. "I went further than I had. I felt like I was stuck in a spot there for awhile and all I was doing was dwelling on these other people, you know, who had done these things" referring to "the Rileys" who had "done a lot of bad things to me." Gerald decided when he left Sharon Smith's that he would go talk to Minis about his claim that he was the devil. *Id*.

Gerald went home and put laundry in, then decided to go to Minis's. He went to get cigarettes because he didn't know if he would have the courage to talk to Minis.

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[9] The next several paragraphs, marked "*Id*." at the end, are all taken from Exhibit 24.

He parked by his shop. The station wasn't open so he got his bike out. The chain kept coming off so he parked the bike and walked over to Minis's. He walked in and hollered, "Hey, you up?" Minis was in the bedroom and came running out when he saw Gerald. Minis picked up a knife. Gerald did, too, because Minis said he would shoot Gerald if he came over, and Gerald was "pretty scared." *Id*.

Gerald met Minis at the bedroom door. Minis said "Why you" and started swinging his arms. Gerald used the knife to defend himself -- a wooden handled knife, "maybe a couple of inches" wide and "six, maybe four or five" inches long. Minis "just throwed back on the bed and there he lay." Gerald was in shock from that point on. He threw the knife in the kitchen and went outside and sat, trying "to grasp hold of what had happened." He wanted to leave. *Id*.

Gerald was not looking for a violent confrontation, but Minis "was a bitter man and he didn't like me. He never showed any interest in any of my ideas or anything that I done, so it ended up that's the way it happened." Gerald knew how to "put on a front like something didn't happen that really did, but it didn't happen that way and I'm here now and I've got to answer for it in front of people that, you know, you told me you was a Christian, and that's been comforting in a way." *Id*. He went on

> . . . we're living in a society now to where America doesn't want to see the warrior archetype of man. They want people with three-sided pyramids and the way things are set up they got us all working on our magician side of how to get out of things, you see. We're all working

> on a three-sided pyramid if we're not able to carry our swords. But the lady of the lake gave me a sword and she gave me the understanding of what it was to be carried for and how it was to be carried and I carried that sword for defense against like what I told you about good and evil to where if evil came, came at me, that I would be able to defend myself and be righteous in the way that I done it.

Id. Gerald received his "spiritual" sword from the lady of the lake when he went to Branson once and slept on the floor of a Catholic church that was a log cabin. *Id*.

Gerald was asked how the fire started and said "I think a lot of that was just panic. After the confrontation, there was just panic." He was not sure how the fire started, but he thought it was from the stove. When asked how he started it, he answered "I don't know why you all think that I started it." King reminded Gerald of their conversation the day before concerning the pan of grease and Gerald said, "Yeah, the burner got turned on." King asked again if it got started when "you turned the burner on under the pan" and Gerald said, "far as I know, 'cause I left. I ran. Because I didn't want to quit running." It "looked like" the kitchen was on fire and the smoke was billowing out when he left. *Id*.

King asked again if Gerald turned the burner on under the grease and Gerald said "I put it on high. Looked like it was already on to me. I don't know if he was getting ready for breakfast or what." As far as Gerald knew nothing but the grease was burning when he left. Gerald ran south through the woods, then turned west and, when he got to Highway 3, went riding through town on his bike. He said that he

took the clothes he was wearing back to his house. He did not know if he put them in the washer.[10] *Id*.

King asked Gerald yet again about the confrontation between good and evil; Gerald responded:

> I just, I already told you about him, what he done to my grandma in front of me. I feel like I've covered it the best I can, you know. That time whenever I was in the highchair as a young baby that I seen him violate my grandma right there in the kitchen, bent her over the table. And then he come over and was sitting there after he got through, he sit down in a chair in front of me and he was laughing about it. And I ended up seeing his spiritual form and how ugly he was underneath his skin. I can remember seeing the horn and reaching out and grabbing it and taking it. I kept it. And then my dad showed up not too long after that wanting to know what happened. Just seemed awful strange all this stuff that occurred 'cause that stuff that happened whenever I was a young kid and I can see why it would have been hid so well from it happening at such an early age. It would have been different if I hadn't been exposed to it, if I hadn't seen it.

Id. When asked if he felt that what he did was right, Gerald said that it was not for

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[10] Several items of clothing were seized from the washer in a search of Gerald's home: T-shirt, underwear, socks, towel, beige shirt, off-white shirt, ball cap (Tr. 314).

him to say, and he would rather let God be his judge than man. *Id*.

Sergeant King testified that during a tape change, Gerald asked if the prosecutor was going to listen to the tape (Tr. 260). He also asked what was going to happen to him; he did not think that he should go to prison for the rest of his life (Tr. 261). When the taped interrogation was over, Gerald asked if King and Muldoon would tell his parents for him what he had done (Tr. 262).

Gerald's Behavior on June 1

On June 1, 1997, Kristin and Kevin Howlett ran into Gerald at a convenience store (Tr. 316-17). Kevin and Gerald were friends and, because Kristin and Kevin were in the middle of moving, Gerald offered to let them use his shower (Tr. 316-17). Kristin said that for four or five hours that evening, they sat and talked while Gerald sharpened a knife (Tr. 318-19). The knife was double bladed -- sharp on both edges -- and Gerald said he used it when hunting deer because with the double edge, he only had to "go up one side" instead of "going up and down" (Tr. 319).[11] While the Howletts sat and talked with Gerald, "out of nowhere" Gerald said he once saw his grandfather do something to his grandmother (Tr. 320). Gerald said he should have killed his grandfather then and wished he had (Tr. 320).

Kristin was approached by a trooper in June, 1997 to give a statement (Tr. 324). She denied being reluctant to do so, but admitted that Kevin did not want her to

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[11] The autopsy revealed that the knife that killed Minis had one sharp side of the blade; the other side was not sharp (Tr. 344).

(Tr. 324). He had charges pending and did not want Kristin to make a statement until he worked out a deal with the prosecutor (Tr. 324). She also wanted to talk to Kevin before she made a statement (Tr. 328). Kevin called the prosecutor and said, "I want a deal before I sing." (Tr. 324).

Kristin insisted that she was willing to write a statement -- she told the trooper in June what she knew -- but actually wrote a statement in October, 1997, after Kevin made his deal with the prosecutor (Tr. 325-26, 328). They were still married at that time (Tr. 327).[12] Kristin knew that Gerald had been charged with murder and that a knife was involved by the time she gave a written statement (Tr. 326).

The Jailhouse Snitch

Stephen McQuinn shared a jail cell with Gerald in August, 1997 (Tr. 330). He said he was there for four and one-half days for failure to pay a speeding ticket (Tr. 330). When asked if he had ever been in any other trouble, he said, "Couple of other speeding tickets, nothing to worry about." (Tr. 330). He had no other criminal convictions "that I recall." (Tr. 330). He guessed, or supposed, on cross-examination, that he had been convicted of animal abuse in Daviess County (Tr. 333-34).

In his four and a half day stay in the county jail, McQuinn spoke with Gerald a "[c]ouple of times." (Tr. 330). There "were several of us in the big cell, in one big cell with different cells." (Tr. 335). McQuinn said Gerald confided in him that "he didn't like his father or grandfather because he said they were the devil." (Tr. 331).

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[12] They were divorced by the time of trial (Tr. 322, 324).

The prosecutor corrected McQuinn and he then testified that Gerald said they "[w]ere from the devil." (Tr. 331). McQuinn answered "yes" when the prosecutor asked "[a]nd they said they wouldn't help him in anyway [sic] financially?" (Tr. 331).

McQuinn also said that Gerald told him that "he went to his father to borrow money for something and that his father wouldn't give it to him so he went to his grandfather. His grandfather wouldn't give it to him and they got in an argument and he fell back and fell down." (Tr. 331-32). When the prosecutor asked McQuinn to repeat his statement McQuinn added "[t]hey got into an argument and he hit his grandfather and his grandfather, he said, fell back and fell down." (Tr. 332). McQuinn was asked what Gerald said about meaning to kill Minis and answered "[h]e said it was an accident." (Tr. 332).

McQuinn also testified that Gerald "said he set the house on fire twice." (Tr. 332). The prosecutor prompted McQuinn for details and McQuinn recalled that Gerald "said that he used gasoline on it the second time because it went out the first time." (Tr. 332-33). The first time the prosecutor asked McQuinn if Gerald told him why he tried to set the house on fire, McQuinn answered "[n]o, not exactly. I just took it for granted." (Tr. 333). The prosecutor said he wanted to know, not how McQuinn took it, but whether Gerald described to McQuinn why he did it, and McQuinn said yes, but the prosecutor did not ask him to tell what Gerald said (Tr. 333). Gerald did not tell McQuinn what time he set the fire (Tr. 335).

By the end of his direct testimony, the "couple of times" McQuinn spoke to Gerald grew to "four or five times" that Gerald confided in McQuinn about his

relationship with his grandfather (Tr. 333). McQuinn said he did not hear Gerald discuss these matters with anyone else (Tr. 335).

Chapter 552 Proceedings

Gerald was sent to Fulton State Hospital on a 96 hour admission soon after his interrogations (Suppr.Tr. 58). The court entered an order for a pretrial evaluation on September 15, 1997 (L.F. 1, 4), and Gerald was taken to Fulton State Hospital on December 18, 1997 (Supp.L.F. 7).[13] Dr. John Zimmerschied evaluated Gerald and determined that he suffered from a mental disease, schizoaffective disorder, which began no later than 1995, and likely had been ongoing for several years (Supp.L.F. 1, 9). Gerald suffered from "bizarre delusions," notably that his grandfather was the devil (Supp.L.F. 9).

Dr. Zimmerschied concluded that Gerald did not have the "capacity to understand the proceedings against him and/or to assist in his own defense." (Supp.L.F. 9). He also said that there was a reasonable probability that Gerald would "be mentally fit to proceed in the reasonably foreseeable future, providing a course of treatment is undertaken including pharmacological therapy for this thought disorder." (Supp.L.F. 10-11). The court took up the issue of Gerald's competence on September

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[13] The report of Fulton State Hospital psychiatrist John Zimmerschied, dated March 2, 1998, was filed with the court and is contained in the supplemental legal file (Supp.L.F. 1-11) and reproduced at App. A-1 - A11; the court took judicial notice of this report in the hearing of September 26, 2000 (StayTr. 56).

9, 1998, and found that Gerald was not able to understand the proceedings against him, "and/or" to assist in his defense, and accordingly committed him to the Department of Mental Health (L.F. 16-17).

On May 5, 1999, the Department filed a motion to proceed, based upon a report of two Department psychologists (L.F. 19).[14] The recommendation of the psychologists included that Gerald should continue on his then-current medication regimen, consisting of 20 mg of Zyprexa per day (Supp.L.F. 14, 18). They noted that Gerald continued to "reflect delusional ideations" surrounding the death of his grandfather (Supp.L.F. 17). On July 28, 1999, the court, without entering an order on the motion to proceed, changed venue of the criminal cause to Livingston County, based upon Gerald's motion filed on August 25, 1997 (L.F. 6, 15). The Attorney General's office then entered the case on behalf of the State (L.F. 21).

Gerald retained an independent psychiatrist to evaluate him regarding Chapter 552 issues, and based upon her evaluation, filed a motion to stay proceedings (L.F. 24, 47). The court took the testimony of Dr. Zimmerschied as part of a hearing on Gerald's motion to suppress statements -- he was called to testify as to those issues (Suppr.Tr. 8-9, 48-57). At the suppression hearing, Dr. Zimmerschied described Gerald's illness as schizoaffective disorder, bipolar type (Suppr.Tr. 53). This illness

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[14] At the hearing of September 26, 2000, the court also took judicial notice of this report, dated April 8, 1999, and it is also included in the supplemental legal file (StayTr. 56; Supp.L.F. 12-19) and the Appendix (App. A-12 - A-18).

involves suffering from delusions or hallucinations and having "discrete periods of mania" -- "having elevated energy, being grandiose, having excessive religious beliefs" (Suppr.Tr. 53). People who are manic can go for days without sleep (Suppr.Tr. 53). Methamphetamine abuse can exacerbate an affected person's delusional state, increasing the intensity (Suppr.Tr. 55-56). Many persons affected with schizoaffective disorder can function on a day to day basis (Suppr.Tr. 56).

The court took testimony from Dr. Rosalyn Inniss, a psychiatrist, at the hearing on Gerald's motion to stay proceedings (StayTr. 2-3). Dr. Inniss's first contact with Gerald was in June, 2000 (StayTr. 7). She met with Gerald on five occasions, totaling probably eighteen hours (StayTr. 8). In addition, she reviewed the tapes of Gerald's statement, many witness statements and police reports, Dr. Zimmerschied's report and other records from Fulton State Hospital, and Gerald's ex-wife's deposition, taken in July, 1992, as part of Gerald's divorce proceedings (StayTr. 9-10).

Dr. Inniss agreed with Dr. Zimmerschied's diagnosis of schizoaffective disorder, bipolar type, and added the additional diagnosis of paranoid schizophrenia, "because in many of his symptoms now he presents much more in that realm now than in the schizoaffective." (StayTr. 11-12). Gerald's "thought processes at times are disorganized and very tangential." (StayTr. 13). He has delusional symptoms that can encompass a number of people, religious preoccupation, and believes he has special powers -- that he can send and receive thoughts (StayTr. 13). Gerald also believes that people are plotting against him about some of the issues concerning trial (StayTr. 13).

In his March 1998 report that Gerald was not competent to go to trial, Dr. Zimmerschied noted that Gerald may also have had delusions about the prosecuting attorney, judge, and law enforcement officials. (Suppr.Tr. 51). Dr. Inniss also said that Gerald believed that his prior attorney had stolen information from him about an invention, that law enforcement officers had done various things to set him up before the court to make him look more guilty, and that they had failed to recover vials, a sword, and other items from Minis's that would have supported Gerald's belief that Minis performed witchcraft, worked spells, and created potions (StayTr. 16-17).

Dr. Inniss told the court that Gerald was "limited in his ability to fully understand the proceedings" and "would be most challenged in the area of being able to give reasonable assistance to counsel in the process of his own defense." (StayTr. 14). Over the course of time that she saw Gerald -- from June 5, 2000, to September 26, 2000, she "watched Mr. Elam's delusions broaden and become more intrusive into his conversation and functioning." (StayTr. 14).

Dr. Inniss was aware that Gerald had been determined to be competent -- as of April, 1999 -- by the psychologists at Fulton State Hospital (StayTr. 18-19, 21-22; Supp.L.F. 13, 18). She said that this was "because he was on medication." (StayTr. 22). Gerald had gone without medication for over a year and though a recurrence of some symptoms would be expected, "at the level I've seen I think they would preclude his ability to reasonably assist in his defense." (StayTr. 14). Gerald did not have the capacity to give his counsel feedback and input "based on the reality of what

has taken place, not just his perception of the -- from a delusional point of, 'These are people who are working against me. They are lying.'" (StayTr. 15).

Gerald's condition had deteriorated over the time Dr. Inniss had met with him (StayTr. 16). She believed that he needed to resume taking "major psychotropic medication" such as the Zyprexa he was taking when he was released from Fulton State Hospital back to the Macon County jail (StayTr. 17-18). The medication would be significant in restoring Gerald to competency, but it would take a little while for it to become effective (StayTr. 20). "He needs to be back on medication, back in treatment before proceeding with the issues before the Court." (StayTr. 23).

Dr. Inniss could track Gerald's illness back at least to 1992, when, during his marriage, he said he had seen the devil (StayTr. 33). Although he could take care of his activities of daily living, what was impacted by his illness was Gerald's "ability to relate to others and on his own behalf in the courtroom, to make reasonable judgments around his defense issues" (StayTr. 34). Dr. Inniss agreed that Gerald showed appropriate behavior or awareness of his circumstances in several areas:

- He appropriately raised his complaint about a lack of television news programming for jail inmates by sending a letter to the county commissioners (StayTr. 42-43; hearing Exhibit 1) (this letter is not dated and it is unclear if it was written before Gerald's commitment to Fulton State Hospital in December, 1997, or after his return from there in 1999; Dr. Inniss noted that this would have been soon after Gerald's transfer from Fulton State Hospital

and he may have still been on medication or still had some in his system) (StayTr. 42-43);

- He was sufficiently aware of his surroundings to be able to recognize that other inmates talking about their burglary loot were describing his own property (StayTr. 44-45; hearing Exhibit 2) (this letter was sent in November, 1997);
- He was sufficiently aware to be able to complain to the judge about his attorney's actions or inactions, asking "the proper percedure [sic] to file the motions that can bring these concerns to the court's attention" (StayTr. 45; hearing Exhibit 3) (this letter, written March 1, 2000, concerned Gerald's complaint about his prior attorney's lack of contact with Gerald "to discuss some important issues that he has been handling through his office");
- He was again able to complain to the court about his attorney, in a letter dated March 6, 2000 (StayTr. 45-46; hearing Exhibit 4) (letter includes Gerald's claims about having an idea for an invention stolen. Gerald raised this at the pretrial hearing on May 15, 2000, and much of the pretrial hearing on June 5, 2000, also concerned this issue) (Pretrial 15-16, 21-25);
- In another letter to the court, Gerald was sufficiently aware of his surroundings to ask to be able to appear in court in civilian clothes with a minimum of restraint (StayTr. 46-47; hearing Exhibit 5); and
- Gerald was sufficiently aware to write a letter to the court after the May 15, 2000 hearing to express his concern about having agreed to a continuance of

his trial (StayTr. 47; hearing Exhibit 6) (Gerald was upset that he was not given enough time to think about his decision before having to make it in court. He also asked the court to investigate his being cheated out of his idea, and his attorney's possible involvement in the swindle).

Dr. Inniss had not been made aware that Gerald, during the suppression hearing the week before, turned around while Dr. Zimmerschied was testifying and snickered to an officer in the courtroom "as if to say, 'I got you guys.'" (StayTr. 41). Nor was she aware that when the court ruled against Gerald on his suppression motion, he turned again and glared at the officer (StayTr. 41-42).

Dr. Inniss knew that Gerald gave his prior counsel a list of trial witnesses that had "some sense to it" -- it was not a list of such people as the pope or the president (StayTr. 49). She knew that he also wrote a letter to the newspaper correcting factual details of a story they ran on the case, but she did not recall whether that letter made sense (StayTr. 50). When Gerald told Dr. Inniss that his cousin introduced him to methamphetamine, he refused to name that cousin (StayTr. 51). She agreed that people involved in drug activities often wish to protect their sources or associates from arrest and prosecution (StayTr. 52).

The State presented testimony from Sergeant Platte, who confirmed the prosecutor's questioning of Dr. Inniss about Gerald's actions at the suppression hearing (StayTr. 60-62). He said that he was in court when Dr. Zimmerschied testified at the suppression hearing, and that at the conclusion of direct examination,

Gerald turned around and looked at Platte and Sergeant King and "gave us what I would consider to be a cat that swallowed the canary type look. It was a grin, like, 'Got you.'" (StayTr. 60-61). And according to Platte, at the conclusion of the hearing, when the court denied the motion to suppress, Gerald turned around and "glared angrily" (StayTr. 62). The court ruled:

> The defendant is presumed to have the mental capacity and fitness to proceed. The defendant has not proven by a preponderance of the evidence that he does not have the mental fitness to proceed. The exhibits admitted as well as the testimony together with the Court's observations of the defendant and the record in this cause belies any allegation that the defendant is unable to assist in his defense. He has been articulate and aware of his circumstances and has so far become involved beyond the usual in the defense of is [sic] case. Court finds there is nothing in the record, in the statements of the defendant, in his correspondence to the Court, that would indicate any mental disease or defect or inability to proceed. The Court, therefore, overrules the defendant's motion to stay proceedings under Section 552.020 (1).

(StayTr. 64-65).

Trial

Dr. Inniss, an examiner with the American Board of Psychiatry, based on her examination of Gerald and various documents and records in the case, concluded that

Gerald's schizoaffective disorder with bipolar element rendered him incapable of knowing and appreciating the nature, quality, or wrongfulness of his conduct in causing Minis's death (Tr. 377-78, 380, 385-86, 394-95, 400). The court submitted the issue to the jury of whether Gerald lacked responsibility for his conduct by reason of mental disease or defect (L.F. 74).

During the State's closing argument, the prosecutor told the jury:

> . . . they want Gerald to go to a mental hospital. Let me tell you something. He will be allowed to play cards with other inmates. He will be allowed to watch T.V. He won't fester there. He gets treatment for whatever problems he has. If we didn't treat him, you know what? There would be lawsuit after lawsuit about his Constitutional rights, and when Mr. Reed says he'll go to a mental hospital, he can get out of that mental hospital, and do you know when he could get out of it? Before you and I get home from here. He could be in there for the rest of is [sic] life but he could get out that quick. You know how he gets out of there? He gets a psychiatrist to come into court and say, 'You know what, Gerald is cured', and do you know what, just like I asked Doctor Inniss, the greatest protection in the world, no one can tell you you're wrong. She said that no one can. It's the greatest thing in the world. You get paid to say whatever and nobody says you're wrong.

(Tr. 507-08).

During the defense argument, counsel asked the jury if they believed Sharon Smith (Tr. 489). Counsel was discussing the discrepancy between Smith's and Michael Croucher's testimony, two State's witnesses, and how they could not both be correct as to when they saw Gerald on the night of June 2 - 3, 1997 (Tr. 489-91). Counsel then went on to ask if the jury believed the testimony of another State's witness, Stephen McQuinn, about Gerald setting two fires, and how this was not possible if the jury believed the other State's witnesses (Tr. 491-92).

Then during the State's closing argument, the prosecutor referred to defense counsel's use of the phrase "if you believe their testimony" (Tr. 505). He said,

> if you believe their testimony when talking about the state's witnesses, you should believe Mr. McQuinn when he talks about the devil but don't believe him when he talks about setting the fire twice. If you believe their testimony the only person that he didn't ask that question about, you know who that was. Sure you do."

(Tr. 505).

The jury found Mr. Elam guilty of first degree murder, armed criminal action, and second degree arson (L.F. 86-88). On November 28, 2000, the court considered Gerald's motion for new trial or judgment of acquittal (Tr. 516-17; L.F. 89-94). Gerald also moved again to stay the proceedings under Chapter 552 (L.F. 101), and

objected to sentencing because Gerald was not competent to proceed (Tr. 528).[15] The court overruled the motion and objection and sentenced Mr. Elam, as a prior offender, to consecutive terms of imprisonment of life without parole, life, and seven years, respectively (L.F. 103). Notice of appeal was filed November 29, 2000 (L.F. 106), and after the Western District of the Court of Appeals affirmed Gerald's convictions in No. WD 59349, this Court granted Gerald's application to transfer his appeal to this Court.

[15] Gerald was represented at this proceeding by trial co-counsel Jane Dunn, because lead counsel Steven Reed had left the Public Defender System and joined the Missouri Attorney General's staff between trial and sentencing (Tr. 516, 528).

POINTS RELIED ON

I.

The trial court erred in finding Gerald competent to stand trial because this ruling denied Gerald his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, Article I, Section 10, of the Missouri Constitution, and his rights under § 552.020.1, in that Gerald suffered from schizoaffective disorder, bipolar type, and paranoid schizophrenia, which left him without a rational understanding of the proceedings or the ability to assist in his defense, and he was therefore incompetent to stand trial. The court ignored the uniform expert evidence that Gerald was not competent without medication, and based its ruling that Gerald did not have "any mental disease or defect or inability to proceed" on its own and a lay police officer's observations of Gerald's behavior.

Pulliam v. State, 480 S.W.2d 896 (Mo. 1972);

State ex rel. Sisco v. Buford, 559 S.W.2d 747 (Mo. banc 1978);

Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966);

Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10; and

§ 552.020.

II.

The trial court plainly erred in failing to declare a mistrial *sua sponte* when the State argued to the jury that if it found Gerald not guilty by reason of mental disease or defect, he could be released before the jury could get home from the trial, because this argument violated Gerald's rights to due process of law, a fair trial before a fair and impartial jury, and to present a defense, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that (1) the argument misstated the law because there is no provision allowing a person acquitted of murder under § 552.030 to seek immediate release, or any other release without court approval; and (2) the argument improperly commented on Gerald's future dangerousness, leading the jury to convict Gerald for irrelevant reasons. If the Court does not correct this error, manifest injustice will inexorably result because Gerald was denied the jury's consideration of his defense without fear of the consequences.

State v. Blakeburn, 859 S.W.2d 170 (Mo. App., W.D. 1993);

State v. Chapman, 936 S.W.2d 135 (Mo. App., E.D. 1996);

State v. Roberts, 838 S.W.2d 126 (Mo. App., E.D. 1992);

State v. Camlen, 515 S.W.2d 574 (Mo. banc 1974);

U.S. Const., Amends VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a);

§§ 552.030 and 552.040; and

Rule 30.20.

III.

The trial court plainly erred in failing to declare a mistrial *sua sponte* when the State's closing argument referred to Gerald's failure to testify, in violation of Gerald's rights to remain silent, to due process of law, and to a fair trial before a fair and impartial jury, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a), and 19, of the Missouri Constitution, in that the prosecutor, referring to the defense argument about whether the jury should believe the State's witnesses, said, "the only person that he didn't ask that question about, you know who that was. Sure you do" which was an improper direct or indirect reference to Gerald's failure to testify. Unless this Court grants a new trial, manifest injustice will inexorably result because the jury was led to believe that it could consider Gerald's failure to testify on the issue of whether he was responsible for his conduct.

State v. Neff, 978 S.W.2d 341 (Mo. banc 1998);

State v. Conway, 348 Mo. 580, 154 S.W.2d 128 (1941);

State v. Barnum, 14 S.W.3d 587 (Mo. banc 2000);

State v. Roberts, 838 S.W.2d 126 (Mo. App. E.D. 1992);

§546.270; and

Missouri Supreme Court Rules 27.05 and 30.03.

ARGUMENT

I.

The trial court erred in finding Gerald competent to stand trial because this ruling denied Gerald his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, Article I, Section 10, of the Missouri Constitution, and his rights under § 552.020.1, in that Gerald suffered from schizoaffective disorder, bipolar type, and paranoid schizophrenia, which left him without a rational understanding of the proceedings or the ability to assist in his defense, and he was therefore incompetent to stand trial. The court ignored the uniform expert evidence that Gerald was not competent without medication, and based its ruling that Gerald did not have "any mental disease or defect or inability to proceed" on its own and a lay police officer's observations of Gerald's behavior.

Nothing about Gerald's underlying condition changed between the court finding Gerald incompetent to proceed to trial in September, 1998, but competent in September 2000.

The September 1998 ruling was based on an evaluation by Dr. John Zimmerschied, a psychiatrist at Fulton State Hospital ("FSH"), after Gerald was sent there in December, 1997, for a mental evaluation (L.F. 4; Supp.L.F. 1-11; App. A-1 - A-11). After meeting with Gerald, and reviewing the investigative reports, Gerald's FSH medical and psychological records, and the preliminary hearing transcript, Dr.

Zimmerschied diagnosed Gerald in March, 1998, with schizoaffective disorder, bipolar type, rendering Gerald unable to understand the proceedings against him or to assist in his own defense (Supp.L.F. 1, 7-9; App. A-1, A-7 - A-9). [16]

Dr. Zimmerschied described schizoaffective disorder, bipolar type, as involving suffering from delusions or hallucinations and having "discrete periods of mania -- "having elevated energy, being grandiose, having excessive religious beliefs" (Suppr.Tr. 53).[17] In his report, Dr. Zimmerschied said that there was a reasonable probability that Gerald would "be mentally fit to proceed in the reasonably foreseeable future, providing a course of treatment is undertaken *including pharmacological therapy* for this thought disorder." (Supp.L.F. 10-11; App. A-10 - A-11) (emphasis added).

Dr. Zimmerschied considered Gerald incompetent to stand trial though he was able to name the charge against him, claim that he was acting in self-defense, describe the roles of his attorney and the prosecutor, name the judge, and describe what would happen on guilty and not guilty verdicts (Supp.L.F. 8; App. A-8). Despite this understanding of the case and the legal process, Gerald also frequently digressed into tangential and delusional ideas about the incident, his grandfather, law enforcement officers, county officials, and the circuit judge (Supp.L.F. 8; App. A-8).

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[16] The court took judicial notice of the Dr. Zimmerschied's report (StayTr. 56).

[17] This testimony came during a hearing on a motion to suppress statements (Suppr.Tr. 47- 57).

The court ruled Gerald to be incompetent to assist in his defense and he was admitted to FSH in September, 1998 (L.F. 16-18; Supp.L.F. 12; App. A-12). As described by FSH psychologist Hossein Mojdehi, Dr. Rawlani, a staff psychiatrist concurred with Dr. Zimmerschied's diagnosis and prescribed 10 mg. of Zyprexa per day for Gerald, which was doubled a few weeks later (Supp.L.F. 14-15; App. A-14 - A-15).[18] Mojdehi interviewed Gerald in March, 1998, and he and his supervisor, psychologist Michael Stacy, continued the diagnosis of schizoaffective disorder in their report of April 8, 1999 (Supp.L.F. 17; App. A-17). In a reversal from Dr. Zimmerschied's report, despite Gerald's "tendency to digress", "excitement, pressured speech and delusional beliefs", the psychologists believed Gerald to be competent, but specifically said that he should "remain on his current medication regimen." (Supp.L.F. 15, 17-18; App. A-15, A-17 - A-18).

In the course of the interviews, Gerald told Mojdehi that he did not suffer from any kind of psychosis and therefore did not need psychotropic medication (Supp.L.F. 17; App. A-17). The psychologists' report also noted that:

> Mr. Elam continues to voice some thoughts, particularly with regard to the alleged homicide of his grandfather, which, in the opinion of the present examiner, reflect delusional ideations. In the process, he becomes excited, exhibits push of speech, and is occasionally distracted from the original question or the issue under discussion.

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[18] The court also took judicial notice of the psychologists' report (StayTr. 56).

(Supp.L.F. 17; App. A-17).

The diagnosis of schizoaffective disorder, bipolar type, then, went unchanged from Dr. Zimmerschied's initial diagnosis in March, 1998, to Dr. Rawlani's September 1998 assessment upon Gerald's admission, to the report of Drs. Mojdehi and Stacy in April, 1999. And it was also the diagnosis reached by Dr. Roslyn Inniss, an examiner with the American Board of Psychiatry with over twenty-five years experience practicing psychiatry, who saw Gerald on five occasions, totaling probably eighteen hours between June and September, 2000 (Tr. 377-78; StayTr. 6, 8, 11-12, 14). Dr. Inniss concluded that Gerald's disorder precluded his ability to reasonably assist in his defense (StayTr. 14).

What changed between April, 1999, and September, 2000, was that Gerald was no longer taking medication. Although the State's psychologists specifically recommended that Gerald continue his medication, he had not taken his medication for over a year as of the hearing in September, 2000 (StayTr. 14), and no mental health expert other than Dr. Inniss had examined Gerald from April, 1999, until the stay hearing. Indeed, Dr. Inniss found, not surprisingly, that Gerald's condition had deteriorated while he was off his medication -- it had even deteriorated from June to September to where he could be called a paranoid schizophrenic (StayTr. 11, 14).

Dr. Inniss explained that Gerald's "thought processes at times are disorganized and very tangential." (StayTr. 13). He has delusional symptoms that can encompass a number of people, religious preoccupation, and believes he has special powers -- that

he can send and receive thoughts (StayTr. 13). Gerald also believes that people are plotting against him about some of the issues concerning trial (StayTr. 13).

Dr. Inniss further told the court that Gerald was "limited in his ability to fully understand the proceedings" and "would be most challenged in the area of being able to give reasonable assistance to counsel in the process of his own defense." (StayTr. 14). Over the course of time that she saw Gerald -- from June 5, 2000, to September 26, 2000, she "watched Mr. Elam's delusions broaden and become more intrusive into his conversation and functioning." (StayTr. 14).

Dr. Inniss explained that the reason Gerald had been determined to be competent -- as of April, 1999 -- by the staff at Fulton State Hospital was "because he was on medication." (StayTr. 22). But as of the hearing, Gerald had gone without medication for over a year and the level of recurrence of symptoms that Dr. Inniss saw "would preclude his ability to reasonably assist in his defense." (StayTr. 14). In other words, he had reverted to his pre-hospitalization, pre-medication condition.

Gerald did not have the capacity to give his counsel feedback and input "based on the reality of what has taken place, not just his perception of the -- from a delusional point of, 'These are people who are working against me. They are lying.'" (StayTr. 15). What was impacted by his illness was Gerald's "ability to relate to others and on his own behalf in the courtroom, to make reasonable judgments around his defense issues" (StayTr. 34).

A careful review of the reports from the experts shows that nothing about Gerald had changed; his ability to assist in his defense was determined by whether or

not he was on his medication, but in September, 2000, he had been off his medication for more than a year. Nonetheless, the court ruled:

> The defendant is presumed to have the mental capacity and fitness to proceed. The defendant has not proven by a preponderance of the evidence that he does not have the mental fitness to proceed. The exhibits admitted as well as the testimony together with the Court's observations of the defendant and the record in this cause belies any allegation that the defendant is unable to assist in his defense. He has been articulate and aware of his circumstances and has so far become involved beyond the usual in the defense of is [sic] case. Court finds there is nothing in the record, in the statements of the defendant, in his correspondence to the Court, that would indicate any mental disease or defect or inability to proceed.

(StayTr. 64-65).

"No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." § 552.020.1. Convicting a defendant who is incompetent violates due process. ***Pate v. Robinson***, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966).

The test for assessing a defendant's competence to stand trial is "'whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has rational as well as factual understanding of the proceedings against him.'" ***Pulliam v. State***, 480 S.W.2d 896, 903 (Mo. 1972) (*quoting* ***Dusky v. United States***, 362 U.S. 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960)); ***State v. Wise***, 879 S.W.2d 494, 507 (Mo. banc 1994); *accord*, ***Drope v. Missouri***, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975) (defendant must have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense"). *Also see* ***State v. Johns***, 34 S.W.3d 93, 104 (Mo. banc 2000).

When this Court reviews a challenge directed at a trial court's ruling that a defendant is competent to proceed, it is "not bound by and need not defer to [the trial court's] conclusion as to the legal effect of his finding of fact." ***State ex rel. Sisco v. Buford***, 559 S.W.2d 747, 748 (Mo. banc 1978). In general, a trial court's decision will be reversed if there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. ***Murphy v. Carron***, 536 S.W.2d 30, 32 (Mo. banc 1976). Appellate courts must exercise caution in setting aside a judgment as being "against the weight of the evidence," and should do so "with a firm belief that the decree or judgment is wrong." *Id*.

However, when the record engenders a firm belief that the judgment is wrong, the reviewing court may weigh the evidence including, of necessity, evidence and all reasonable inferences drawn therefrom, which is contrary to the judgment. ***Marsh v.***

State, 942 S.W.2d 385, 388 (Mo. App., W.D. 1997). This record engenders a firm belief that the judgment is wrong, and this Court must examine the evidence carefully. Although the trial court was correct that under § 552.020.8 Gerald was presumed fit to proceed and bore the burden of proving otherwise, the record as a whole demonstrates conclusively that Gerald was not competent to go to trial.

The State's psychiatrist found Gerald to be unable to assist in his defense (Supp.L.F. 9; App. A-9). This could be corrected, "providing a course of treatment is undertaken *including pharmacological therapy* for this thought disorder." (Supp.L.F. 10-11; App. A-10 - A-11) (emphasis added). The State's psychologists found Gerald able to assist in his defense, but this conclusion was based upon Gerald's history of taking medication from his admission until their evaluation, and they specifically recommended that he continue the regime (Supp.L.F. 17-18; App. A-17 - A-18). But Gerald had not taken his medication for a year or more as of the hearing in September, 2000 (StayTr. 14). And Dr. Inniss explained that the reason Gerald had been determined to be competent -- as of April, 1999 -- by the staff at Fulton State Hospital was "because he was on medication." (StayTr. 22).

Against this knowledge of four people with expertise in the workings of the human mind, who had studied Gerald specifically, the court pitted its own observations of Gerald in court and testimony from one of the interrogating officers, with no stated psychological credentials, who had formed an opinion that Gerald was guilty of murder, or at least arson (Tr. 231). The officer had, for a total of perhaps ten

or twenty seconds, interpreted brief glances in a courtroom environment as somehow showing Gerald's awareness of the legal process (StayTr. 61-62).

The officer's testimony was of no consequence when considered with the opinions of two psychiatrists who had specifically examined Gerald to determine his ability to assist counsel, not his ability to understand when a statement from a witness or a ruling from the court is favorable or unfavorable. That is not the test of competence, and, to the extent the court relied on it, it erroneously declared or applied the law. ***Murphy***, *supra*.

And there was also, of course, the court's own observations of Gerald's participation in court. Gerald made many statements concerning issues that concerned him, and the court deemed him "articulate and aware of his circumstances and has so far become involved beyond the usual in the defense of [h]is case." (StayTr. 64-65). This is not a legitimate basis on which to ignore the medical evidence, because it cannot withstand scrutiny alongside the findings of the mental health experts, in that it ignores an important part of the test from ***Dusky***, *supra*, quoted in ***Johns***: "'whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." 34 S.W.3d at 104.

Gerald does not ask this Court to accept the opinion of the defense psychiatrist over that of the State's psychiatrist, as was the case in ***Johns***. *Id*., at 104-105. Here, *all* the experts were in agreement that Gerald required medication to be competent. And he was not on medication. Similarly, in ***State v. Hampton***, 959 S.W.2d 444, 450 (Mo. banc 1997), this Court said that, "[a]n expert report found, and the trial court

ruled, that Mr. Hampton suffered no inability to assist in his defense." Again, there was no such expert report from the State in this case. The psychologists' report addressed only Gerald's condition seventeen months before trial, and based on a factor, medication, that no longer existed.

Being articulate about his complaints about jail conditions and aware of some of the issues involved does not make Gerald able to consult with his lawyer about his defense when, as Dr. Inniss explained, his delusions meant that Gerald did not have the capacity to give his counsel feedback and input "based on the reality of what has taken place, not just his perception of the -- from a delusional point of, 'These are people who are working against me. They are lying.'" (StayTr. 15). Gerald's feedback to the court -- what made him appear articulate and involved -- was, for all the court knew, the product of his delusions. Indeed Gerald's fixation on being cheated of his invention (Pretrial 21-25), indicates his difficulty with focusing on the matter at hand -- his defense on first degree murder -- rather than petty slights, real or perceived. Gerald's ability to *articulate* his delusions does not mean that he could *overcome* those delusions and assist in his defense.

Further, Dr. Zimmerschied, in his original report, was aware that Gerald had assisted a burglary investigation when he overheard other jail inmates discussing stolen property that Gerald realized was his own (Supp.L.F. 2; App. A-2). This ability did not make Gerald competent in Dr. Zimmerschied's expert opinion, and the State's use of this evidence at the Stay hearing to "prove" Gerald's competence was therefore misplaced (StayTr. 43-45). This evidence may have related to Gerald's

"awareness of his surroundings", but even Dr. Zimmerschied placed no significant weight on it.

The court's finding that "there is nothing in the record, in the statements of the defendant, in his correspondence to the Court, that would indicate any mental disease or defect or inability to proceed" is so far unsupported by the evidence as to conclusively demonstrate the court's error. There was an *enormous* amount of uncontradicted expert evidence that "indicated a mental disease." For this Court to allow the trial court to ignore it so completely means that a ruling on this issue is categorically unreviewable, and thus the presumption of competency of § 552.020 becomes an irrebuttable presumption. This is not consistent with the principle of ***Pate*** that we may not, consistently with due process, convict those who are not competent to defend themselves. 383 U.S. at 378, 86 S.Ct. at 838.

Summary

State psychiatrist John Zimmerschied examined Gerald and found him to be incompetent, and that he might be brought to a state of competence with treatment, including pharmacological therapy (Supp.L.F. 10-11; App. A-10 - A-11). State psychiatrist Rawlani prescribed such therapy, doubling the dosage in a few weeks (Supp.L.F. 14-15; App. A-14 - A-15). State's psychologists Hossein Mojdehi and Michael Stacy examined Gerald several months into that therapy, found that he had responded to it, and, despite his continuing underlying mental illness, found Gerald to be *at that point in time -- April, 1999* -- competent to proceed to trial (Supp.L.F. 17-18; App. A-17 - A-18).

Unfortunately, seventeen months later, at the time of hearing and trial, Gerald was not on pharmacological therapy. And as discovered by Dr. Roslyn Inniss, examiner with the American Board of Psychiatry with over twenty-five years experience practicing psychiatry, Gerald was no longer competent, indeed over only three or four months his "ability to track and to attend and to participate in the process deteriorate[ed]" (StayTr. 32).

A review of this record engenders a firm belief that the trial court's finding of competency was erroneous. The court had no basis on which to credit its own and sergeant Platte's opinions over the mental health experts, ***Marsh***, 942 S.W.2d at 388. It therefore erred in finding that Gerald was mentally competent to proceed and assist in his defense, because the evidence was uniform that Gerald did not have the ability to consult with counsel with a reasonable degree of rational understanding. ***Dusky***, *supra*. Therefore, this Court must vacate Gerald's convictions and sentences.

II.

The trial court plainly erred in failing to declare a mistrial *sua sponte* when the State argued to the jury that if it found Gerald not guilty by reason of mental disease or defect, he could be released before the jury could get home from the trial, because this argument violated Gerald's rights to due process of law, a fair trial before a fair and impartial jury, and to present a defense, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that (1) the argument misstated the law because there is no provision allowing a person acquitted of murder under § 552.030 to seek immediate release, or any other release without court approval; and (2) the argument improperly commented on Gerald's future dangerousness, leading the jury to convict Gerald for irrelevant reasons. If the Court does not correct this error, manifest injustice will inexorably result because Gerald was denied the jury's consideration of his defense without fear of the consequences.

During the State's closing argument, the prosecutor told the jury:

> . . . they want Gerald to go to a mental hospital. Let me tell you something. He will be allowed to play cards with other inmates. He will be allowed to watch T.V. He won't fester there. He gets treatment for whatever problems he has. If we didn't treat him, you know what? There would be lawsuit after lawsuit about his Constitutional rights, and

> when Mr. Reed says he'll go to a mental hospital, he can get out of that mental hospital, and do you know when he could get out of it? Before you and I get home from here. He could be in there for the rest of is [sic] life but he could get out that quick. You know how he gets out of there? He gets a psychiatrist to come into court and say, 'You know what, Gerald is cured', and do you know what, just like I asked Doctor Inniss, the greatest protection in the world, no one can tell you you're wrong.

(Tr. 507-08). Gerald did not object to this argument.

Under § 552.040.2, Gerald was *not* entitled even to a *hearing* on immediate release just by "getting" a psychiatrist to say 'he's cured':

> When an accused is tried and acquitted on the ground of mental disease or defect excluding responsibility, the court shall order such person committed to the director of the department of mental health for custody. The court shall also order custody and care in a state mental health or retardation facility unless an immediate conditional release is granted pursuant to this section. *If the accused has not been charged with . . . murder in the first degree* pursuant to section 565.020, RSMo, . . . the court shall hold a hearing to determine if an immediate conditional release is appropriate. . . .

(emphasis added).

The prosecutor's argument was offensive to the notions of justice and fairness. It was dishonest, because it informed the jury of a possibility that could not happen under the law. It was also misleading, because even if Gerald would have been entitled to a *hearing* on release, conditional or unconditional, the prosecutor's argument did not inform the jury that the decision was up to the court, not Gerald's psychiatrist, nor that there are specific requirements under § 552.040 for hearings and for releases of those found acquitted under § 552.030.

Misstatements of the law are impermissible during closing arguments, and the trial court has a duty to restrain such arguments. ***State v. Blakeburn***, 859 S.W.2d 170, 174 (Mo. App., W.D. 1993). It is not the prerogative of counsel to inform a jury as to the law. ***State v. Graham***, 916 S.W.2d 434, 436 (Mo. App., E.D. 1996). The prosecutor's argument here was out of bounds because it incorrectly gave the jury a reason to believe that Gerald could be released merely for the asking if the jury accepted Dr. Inniss's testimony. And this was even more prejudicial where the jury could by that time view Dr. Inniss as being on Gerald's "side", and as such an obvious choice for the doctor to come into court and say "Gerald is cured." The jury really *could* see that happening before they got home.

Gerald's release could not have happened as the prosecutor claimed because all applications for unconditional release are governed by § 552.040.5. All applications for conditional release are governed by § 552.040.10, which in turn imposes the requirements of subsection 5 in cases, such as here, of a person committed for first degree murder. Therefore, in either case, § 552.040.5 controls, and that section first

provides for a thirty day period in which interest parties may object, *and* a mental examination of the committed person upon request, before any hearing on an application for release.

These are minimum requirements. Any claim by the prosecutor that Gerald would have been released in the minimum time had he been acquitted of first degree murder by virtue of § 552.030, is specious. It absolutely would not happen. In ***State v. Camlen***, 515 S.W.2d 574 (Mo. banc 1974), this Court held that it was error for the prosecutor to tell the jury that:

> The question involved here is, is this man going to get away with it on the defense that he has something wrong with his personality.
>
> * * *
>
> . . . And they come in here today to try to flim-flam you into this personality situation to try to indicate to you that . . . you ought to send him down to the State Hospital for treatment. Then they say, 'Now, don't worry about it, he's going to be down there for a long time.'
>
> We have a hearing in this court and who is going to testify at this hearing, the same fellow that was here today. And what's he going to say --
>
> * * *
>
> 'No mental disease, no mental defect,' and he's out on the street.

Id. at 575-76. Though the error in ***Camlen*** was preserved, the prosecutor here misstated the law just as prejudicially, and disparaged Gerald's defense just as

severely as in that case. But even if this were not the law of Missouri, it was not up to the prosecutor to set it out for the jury. ***Graham***, 916 S.W.2d at 436. That was the province of the judge.

The second reason that this argument was improper is that it implied to the jury that if they did not convict Gerald, he would be out roaming the streets, threatening others or the jurors themselves, "[b]efore you and I get home from here." (Tr. 507).

A defendant is on trial for the crime he is alleged to have committed in the past, not for what he might do in the future. ***State v. Chapman***, 936 S.W.2d 135, 140 (Mo. App., E.D. 1996). The State may not refer to a defendant's criminal proclivities during closing arguments or suggest that the jury convict him to prevent him from committing future crimes. *Id*. Additionally, the State should not speculate regarding future crimes the defendant may commit. ***State v. Schaefer***, 855 S.W.2d 504, 507 (Mo. App., E.D. 1993).

As the State's representative, prosecutors must remain impartial. ***State v. Storey***, 901 S.W.2d 886, 901 (Mo. banc 1995). When they do not, trial courts must act, even *sua sponte*, to cure the error. ***State v. Roberts***, 838 S.W.2d 126, 131 (Mo. App., E.D. 1992). Nor should the prosecutor make any argument which would inflame the passions or prejudices of the jury. ***State v. Givens***, 851 S.W.2d 754, 758 (Mo. App., E.D. 1993).

Prosecutorial misconduct in argument may become unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." ***Donnelly v. DeChristoforo***, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40

L.Ed.2d 431 (1974). Here, the prosecutor was hardly neutral as he tried to disable Gerald's lone defense, a lack of responsibility, based on the (apparently to the prosecutor) unlikely idea that an examiner of the American Board of Psychiatry might just know something about mental disease. The prosecutor chose not to counter that defense with evidence, other than using his cross-examination of Dr. Inniss to inject hearsay about Dr. Zimmerschied's differing opinion (Tr. 414-16).[19] Instead, he sought to instill fear of the consequences of following the evidence in the case -- that Gerald might be released before the jurors got home from the trial.

Mistrial

Declaration of a mistrial is within the sound discretion of the trial court, and should be granted only where the prejudice cannot be removed any other way. ***State v. Johnson***, 901 S.W.2d 60, 62 (Mo. banc 1995). The trial court has broad discretion in determining the scope of closing arguments. ***State v. Nicklasson***, 967 S.W.2d 596, 615 (Mo. banc 1998). Unless an abuse of that discretion prejudices the defendant, an appellate court will not disturb the trial court's ruling on such matters. ***State v. Rousan***, 961 S.W.2d 831, 851 (Mo. banc 1998). It will reverse a conviction on the

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[19] Actually, Dr. Zimmerschied agreed that Gerald was not able, because of mental disease, to appreciate the nature and quality of his conduct; he disagreed with Dr. Inniss only as to Gerald's ability to appreciate the wrongfulness of that conduct (Suppr.Tr. 50-51, 56). His testimony therefore would have supported a finding that Gerald was not responsible under § 552.030.

grounds of improper argument only if the defendant establishes that the comments had a decisive effect on the jury's verdict or that the argument was "plainly unwarranted." ***State v. Petty***, 967 S.W.2d 127, 135 (Mo. App., E.D. 1998).

Gerald has met this test. The only expert testimony admitted was that Gerald's schizoaffective disorder rendered him unable to appreciate the nature, quality and wrongfulness of his conduct (Tr. 400). Had Gerald been given a fair chance to have the jury consider that evidence, the jury probably would have acquitted him under § 552.030. But the prosecutor denied Gerald that chance because his improper argument was *both* "plainly unwarranted" *and* had a decisive effect. The court should not have allowed it.

In ***State v. Tiedt***, 357 Mo. 115, 206 S.W.2d 524, 526 (banc 1947), the defendant's conviction of first degree murder was reversed due to improper remarks made by the prosecutor. This Court said that "It is a fundamental concept of criminal law that an accused, whether guilty or innocent, is entitled to a fair trial, so it is the duty of the trial court, and of prosecuting counsel as well, to see that he gets one. . . ." *Id*., 206 S.W.2d at 526. And in holding that the level of prejudice was such that the verdict could not stand, the Court stated, "prosecuting officers should . . . avoid injecting into the minds of the jury any matter which is not proper for their consideration, or which would add to the prejudice which the charge itself has produced in their minds." *Id*. at 527, *citing*, ***State v. Horton***, 247 Mo. 657, 153 S.W. 1051, 1054 (Mo. 1913).

Plain Error

However, Gerald's counsel did not object to this argument, and ordinarily, this would preserve nothing for appellate review. ***State v. Phelps***, 965 S.W.2d 357, 358 (Mo. App., W.D. 1998). But plain error relief is appropriate when the alleged error so affects the rights of the defendant as to cause a manifest injustice or miscarriage of justice. *Id*.; Rule 30.20. And when prosecutors do not maintain their neutrality, trial courts must act, even *sua sponte*, to cure the error. ***Roberts***, 838 S.W.2d at 131. In some instances, an improper closing argument injects "poison and prejudice" in the minds of the jurors that amounts to plain error. ***State v. Burnfin***, 771 S.W.2d 908, 912 (Mo. App., W.D. 1989).

In fact, in ***Tiedt***, it was the prosecutor's prediction of future murders, and his forecast of no possibility of safety from the defendant, that caused the reversal. 206 S.W.2d at 527-28. That is just what happened here, for the prosecutor told the jury that if they did not convict Gerald, it was possible that he would be released even before they could get home. Indeed, the implication was that he could be there *waiting* for them. This caused a manifest injustice by preventing any possibility that the jury might fairly consider Gerald's sole defense -- a defense well supported by the evidence, and he had a due process right to present that defense. ***Washington v. Texas***, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

Gerald was denied his rights to due process of law and a fair trial as required by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. This denial resulted in a

manifest injustice, and he therefore respectfully requests that this Court reverse his convictions and remand this cause for a new trial.

III.

The trial court plainly erred in failing to declare a mistrial *sua sponte* when the State's closing argument referred to Gerald's failure to testify, in violation of Gerald's rights to remain silent, to due process of law, and to a fair trial before a fair and impartial jury, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a), and 19, of the Missouri Constitution, in that the prosecutor, referring to the defense argument about whether the jury should believe the State's witnesses, said, "the only person that he didn't ask that question about, you know who that was. Sure you do" which was an improper direct or indirect reference to Gerald's failure to testify. Unless this Court grants a new trial, manifest injustice will inexorably result because the jury was led to believe that it could consider Gerald's failure to testify on the issue of whether he was responsible for his conduct.

During the defense argument, counsel asked the jury if they believed Sharon Smith (Tr. 489). Smith had testified that Gerald arrived at her house south of Bevier around 11:30 (Tr. 168). But Croucher said Gerald was in Callao -- ten minutes away -- at midnight (Tr. 151-52). Defense counsel discussed the discrepancy between Smith's and Michael Croucher's testimony, two State's witnesses, and how they could not both be correct as to when they saw Gerald (Tr. 489-91). Counsel then went on to ask if the jury believed the testimony of another State's witness, Stephen

McQuinn, the jailhouse snitch, about Gerald setting two fires, and how this was not possible if the jury believed the other State's witnesses (Tr. 491-92).

Then during the State's closing argument, the prosecutor referred to defense counsel's use of the phrase "if you believe their testimony" (Tr. 505). He said

> if you believe their testimony when talking about the state's witnesses, you should believe Mr. McQuinn when he talks about the devil but don't believe him when he talks about setting the fire twice. If you believe their testimony the only person that he didn't ask that question about, you know who that was. Sure you do."

(Tr. 505).

The "only person" that defense counsel didn't ask that question about was Gerald. It could not have been anyone else. Gerald was never asked -- on the stand -- where he was that night. He was not asked because he never took the stand. And the prosecutor pointed that out to the jury. Sure he did.

Defense counsel could *not* ask whether the jury believed *Gerald's* testimony because counsel had no testimony from Gerald to *ask* about.

The Fifth Amendment to the United States Constitution, Article I, section 19 of the Missouri Constitution, § 546.270, RSMo 1994, and Supreme Court Rule 27.05(a) grant criminal defendants the right not to testify and forbid comments by either party concerning the exercise of that right. ***State v. Barnum***, 14 S.W.3d 587, 591-92 (Mo. banc 2000). In pertinent part, § 546.270 states, "If the accused shall not avail himself

. . . of his . . . right to testify . . . it shall not . . . be referred to by any attorney in the case. . . ." The purpose of this rule is to avoid focusing the jury's attention upon a defendant's failure to testify. ***State v. Neff***, 978 S.W.2d 341, 344 (Mo. banc 1998). Under § 546.270, there is no question that it is error to allude, either directly or indirectly, to a defendant's failure to testify on his own behalf. ***State v. Conway***, 348 Mo. 580, 154 S.W.2d 128, 132 (1941).

A direct reference to defendant's failure to testify occurs when the prosecutor uses words such as "defendant," "accused," and "testify" or their equivalent. ***Neff***, 978 S.W.2d at 344. "An indirect reference is one reasonably apt to direct the jury's attention to the defendant's failure to testify." *Id*. Where an objection is made and overruled, a direct reference will almost always require a reversal; however, an indirect reference will only require reversal if there was a calculated intent to magnify that decision so as to draw the jury's attention to it. *Id*.

This was a direct reference, because it used the word "testimony" and because the sleight of hand maneuver by the prosecutor was the equivalent of "defendant". If "the only person" was anyone other than Gerald, the prosecutor would have had no problem naming them. There was no prohibition against naming any other witness. But the prosecutor could not name Gerald. Perhaps he realized his error just before letting the name slip, but the reference to Gerald was made clear when the prosecutor added "sure you do." This not only clarified the reference but showed a "calculated intent to magnify that decision so as to draw the jury's attention to it." *Id*. Therefore, even if the Court holds that this was an *in*direct reference, it was error to allow it.

Declaration of a mistrial is within the sound discretion of the trial court, and should be granted only where the prejudice cannot be removed any other way. ***State v. Johnson***, 901 S.W.2d 60, 62 (Mo. banc 1995). The trial court has broad discretion in determining the scope of closing arguments. ***State v. Nicklasson***, 967 S.W.2d 596, 615 (Mo. banc 1998). Unless an abuse of that discretion prejudices the defendant, an appellate court will not disturb the trial court's ruling on such matters. ***State v. Rousan***, 961 S.W.2d 831, 851 (Mo. banc 1998). It will reverse a conviction on the grounds of improper argument only if the defendant establishes that the comments had a decisive effect on the jury's verdict or that the argument was "plainly unwarranted." ***State v. Petty***, 967 S.W.2d 127, 135 (Mo. App., E.D. 1998).

This error is not preserved, and Gerald requests plain error review under Rule 30.20. It is particularly difficult to obtain relief based on an assertion of plain error concerning closing argument, because the failure to object during closing argument is more likely a function of trial strategy than of error. ***State v. Cobb***, 875 S.W.2d 533, 537 (Mo. banc 1994), *cert. denied*, 513 U.S. 896, (1994); ***State v. Boyd***, 844 S.W.2d 524, 529 (Mo. App. E.D. 1992). To be entitled to relief under plain error review a defendant must establish that the improper argument had a decisive effect on the jury by showing that, "in absence of these comments, the verdict would have been different." ***State v. Sloan***, 998 S.W.2d 142, 146 (Mo. App. E.D. 1999), citing ***State v. Roberts***, 838 S.W.2d 126, 132 (Mo. App. E.D. 1992).

Gerald has met this test. The only possible person to whom this reference could have been made was Gerald. Gerald did not testify and defense counsel could

not ask the jury whether they believed Gerald. "Sure" the jury knew who it was that did not take the stand, and "sure" they understood the prosecutor's meaning as to why he did not -- because the prosecutor believed that Gerald would not have been able to convince the jury of his defense of lack of responsibility if he had to testify.

It was important for the State's theory of the case to argue that Gerald killed his grandfather around midnight, not early in the morning, because then it could argue that there was deliberation, and an attempt to create an alibi by going to Sharon Smith's house. Had the prosecutor not implied to the jury that Gerald failed to tell them directly how the incident happened, thereby violating his Fifth Amendment right, the jury would have given fair consideration of his defense of lack of responsibility. But by pointing out Gerald's failure to testify, the prosecutor focused the jury's attention not on the mental status evidence, but on Gerald's failure to tell the jury that he did not stab Minis until shortly before the fire started. The court should have ended this trial at this point so that Gerald could begin again with an impartial jury. This Court must correct this error or manifest injustice will inexorably result.

CONCLUSION

For the reasons set forth in Point I, appellant Gerald Elam respectfully requests that this Court vacate his convictions and sentence. In the alternative, for the reasons set forth in Points II and III, Gerald respectfully requests that this Court reverse his convictions and sentence and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 15,671 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.1, updated in September, 2002. According to that program, these disks are virus-free.

On the _____ day of September, 2002, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, MO 65109.

_____
Kent Denzel

APPENDIX